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88-1420

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1988

FEDERICO EREBIA

Petitioner,

-vs-

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

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QUESTION PRESENTED

Given a finding of intentional racial discrimination in violation of Title VII, does a federal district court have discretion to deny the victimized employee both reinstatement and front pay?

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OPINIONS BELOW

Petitioner filed a complaint in Case No. C-84-7896 in the United States District Court for the Northern District of Ohio, Western Division in 1984, with a jury demand, claiming he was retaliatorily discharged from employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., and the Civil Rights Act of 1966, 42 U.S.C. Section 1981. The trial court entered judgment on the jury verdict for petitioner on the 42 U.S.C. Section 1981 claim on December 29, 1986. Appendix B. The court's decision on the Title VII claim, denying reinstatement and awarding petitioner $1.00 compensatory damages for front pay was entered on the same date, Appendix C, with the Findings of Fact, Conclusions of Law, and Judgment

filed December 24, 1986. Appendix D and see Appendix E.

By a per curiam opinion dated November 25, 1988, with one judge concurring and dissenting, the United States Court of Appeals for the Sixth Circuit affirmed the action of the district court concerning the Section 1981 and Title VII claims, except that regarding the possible remedy of reinstatement, the court remanded the case for further consideration of whether an equivalent employment position was available with respondent. Erebia v. Chrysler Plastic Products Corp., Nos. 87-3297, 3298, slip. op. (6th Cir. Nov. 25, 1988). Appendix A.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1254(1). The

United States Court of Appeals for the Sixth Circuit affirmed the trial court's refusal to either order reinstatement to petitioner's former position or award front pay exceeding $1.00 on November 25, 1988. Therefore, this Petition is timely filed pursuant to Sup. Ct. R. 20.2 and 28 U.S.C. Section 2101(c).

STATUTORY PROVISION INVOLVED

The judicial power to remedy violations upon a finding of intentional discrimination is found in Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(g) (1981):

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged

in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, or order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The unlawful employment practice underlying the complaint is found in Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-3(a) (1981):

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioner filed the suit below alleging the respondent, his employer since 1965, had discharged him from employment in

retaliation for successfully litigating an earlier racial discrimination claim under 42 U.S.C. Section 1981 and Title VII. See Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986) (describing the earlier litigation). A jury awarded petitioner $75,000 compensatory damages and $55,000 punitive damages under the Section 1981 claim.

The district court's consideration of the Title VII claim, is the gravamen of this Petition. The judge found that the petitioner established the pretextual nature of respondent's articulated reasons for discharging him. Appendix D at 62. However, the district court refused to either order reinstatement or award backpay. The trial judge did award petitioner attorney fees, costs, and $1 as front pay. Appendix D at 74-75.

Although the trial court recognized that the purpose of Title VII is to make victims whole for injuries caused by illegal employment discrimination, as set forth in Albemarle Paper Co. v. Moody, 411 U.S. 405 (1975), and that such victims are presumptively entitled to reinstatement, petitioner was denied reinstatement. The court concluded plaintiff had waived, or was estopped from pursuing, the right to demand reinstatement because he had requested only front pay in his complaint. Appendix D at 67.

The court further concluded that, as a matter of fact, petitioner had sexually harassed three female co-workers. The respondent had argued that this justified its termination of the petitioner, but the court rejected this, as did the jury on the Section 1981 claim, as mere a pretext to disguise respondent's intentional

retaliatory and discriminatory discharge of petitioner. The district court relied upon this finding of fact, however, to conclude, in dicta, that even if petitioner had requested reinstatement in a manner which met with the approval of the court, reinstatement would be inappropriate due to the hostility resulting from this harassment. In addition, the court concluded that because of this harassment, plaintiff should be awarded compensatory damages, including front pay, in the amount of only $1.00. Appendix D at 70.

The Sixth Circuit Court of Appeals, in a per curiam decision, one judge concurring and dissenting in part, largely approved this analysis and determined that petitioner's behavior outweighed the "make whole" policy of Title VII. Petitioner contends the analyses of the trial court and appellate court, denying him ALL

prospective equitable remedies, despite a finding of intentional discrimination as the "but for" cause of his discharge, violates the policies embodied in Title VII.[1]

This case presents the important question of whether the drafters of the Title VII legislation intended that federal district courts have such a wide scope of discretion that they may deny racial discrimination victims BOTH reinstatement and front pay remedies when the court determines that the discrimination was intentional. Such a concept defeats the

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[1]See Erebia v. Chrysler Plastic Products Corp., Nos. 87-3297, 3298, Slip Op. (6th Cir. Nov. 25, 1988), Appendix A at 44. (Cook, J., dissenting). (The majority in this case affirmed a trial court decision holding petitioner was not entitled to reinstatement or back pay even though he was impermissibly subjected to retaliation in violation of Title VII. The record does not permit a complete denial of equitable relief to a prevailing party.)

clear legislative intent that such discrimination victims be made whole, which has been recognized by this Court in cases such as Albemarle.

It must be emphasized that the remedial power authorized in Section 2000e-5(g) is predicated upon a finding that a Title VII violation is intentional. Because the remedies are equitable in nature, and must be tailored to fit on a case by case basis to make victims whole, the section uses permissive language. In particular the statute uses the word "may" to describe the district court's authority to structure remedial relief. For example, a court may "order such affirmative action as may be appropriate, which may include reinstatement, with or without back pay." (emphasis added).

On its face, the statute appears to impose no absolute obligations upon the

court to order restitutional relief to discrimination victims. However, this Court has recognized that legislative policy limits the discretion given to trial courts in at least two significant ways: the need to make discrimination victims whole, including restoring victims to a position where they would have been were it not for the unlawful discrimination, and the need to deter and eradicate employment discrimination, a historic evil of national proportions. Albemarle, 411 U.S. at 296-97.

In Albemarle, this Court emphatically rejected the concept that district courts have unfettered discretion to deny an equitable remedy. 411 U.S. at 294. In interpreting the legislative history surrounding Title VII, this Court specifically determined that Congress' purpose in vesting a variety of

"discretionary powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the fashion[ing] [of] the most complete relief possible." Id. at 298.

Not only did the decisions below fail to restore petitioner to a position anywhere near where he would have been without respondent's discriminatory retaliation, but the decisions actually punished the plaintiff and not the defendant, despite the fact it was respondent who engaged in illegal conduct.

It is well-settled that the denial of reinstatement without a strong justification will be an abuse of discretion. Once discrimination is found, reinstatement should be granted absent exceptional circumstances. In re Lewis, 845 F.2d 624, 630 (6th Cir. 1988). Where

that denial is coupled with a nominal award of front pay, the arbitrary and capricious nature of the decision is clear.

Reinstatement is the preferred remedy in situations such as this.

> The rule of presumptive reinstatement is justified by reason as well as precedent. When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole.

Allen v. Autauga County Board of Education, 685 F.2d 1302, 1305 (11th Cir. 1982). See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976). Past employee misconduct should not be sufficient to deny reinstatement--unless the employer can demonstrate that the victim would have been terminated independent of the discrimination or retaliation. In this case, the employer's

contention that petitioner would have been terminated independent of the discrimination was rejected by the trial judge and found to be a mere pretext.[2] While the victim may have sexually harassed three employees it was not the reason he was fired.

It must be emphasized that petitioner's injury at the hands of respondent was no less real because he was not a model employee. If the purpose of Title VII is concerned with the consequences of employment practices, without reference to an employer's bad faith or moral turpitude it is difficult to perceive a legislative

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[2]Two members of the Sixth Circuit Court of Appeals panel clearly misanalyzed this point and reached the following erroneous and contradictory conclusion: the district court recognized that plaintiff's harassment of female subordinates was certainly sufficient justification to fire him. See Appendix A at 27.

intent to remedy those consequences with reference to the employee's "bad faith" or "moral turpitude". See Albemarle, 411 U.S. at 299, citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). It is unconscionable for an employee to bear this burden, based on his conduct, when the motivating impetus for the discrimination lawsuit was the employer's conduct!

Nor can this factual finding of harassment be transformed into a finding of hostility between the parties in order to deny reinstatement. Hostility engendered by the litigation has been discredited as a basis for denying reinstatement. E.g. In re Lewis, 845 F.2d at 630; Allen v. Autauga County Board of Education, 685 F.2d at 1305.

The trial court also impermissibly used the victim's conduct as a basis for denying a suitable amount of front pay.

It awarded a nominal $1. Front pay is an equitable remedy given to plaintiffs when reinstatement may not be appropriate. See Shore v. Federal Express, 777 F.2d 1155, 1159 (6th Cir. 1985) at 1159; see Appendix D at 67. There is absolutely no authority to consider misconduct in awarding a front pay remedy. Front pay is a quantifiable remedy to measure future economic harm. As this Court acknowledged in Albemarle, where a legal injury is of an economic character,

> [t]he general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed."

Albemarle at 297 (citation omitted). There was no rational basis for awarding a nominal $1 sum of front pay to a victim

unless it is for the impermissible purpose of punishing a victim for his "moral turpitude". See Appendix A at 49-50, where Cook, J., dissenting, questions the basis used to award $1 of front pay by the trial court and the majority of the appellate court.

Nor can the equitable doctrine of "clean hands" be relied upon to support the court's decision in the face of clear legislative intent and this court's interpretation of that policy embodied in the statutes. It has long been recognized that "unclean hands" may be outweighed by important, overriding public policy reasons, such as those at issue here. See D. Dobbs, Remedies, Chapter 2, Sec. 2.4 at 46 (1973). The courts cannot be permitted to abuse their discretion to legislate a clause which permits only claimants with perfect work records to utilize Title VII.

It must be noted that the Sixth Circuit Court of Appeals' approval of the trial court's decision on the basis that the Section 1981 jury award included future harm is incorrect. While, it is true that there should be only one recovery in any type of legal action, this overlooks this Court's recognition that Title VII expressly preserves alternative and parallel remedies. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).

Finally, the court prevented petitioner from seeking reinstatement due to "waiver" in pleading, which is further evidence of abuse of discretion. This contravenes the clear language of Fed. R. Civ. P. 54(c) (every final judgment shall grant the relief to which the party is entitled, even if the party has not demanded such relief in the party's pleading); also see Whatley

v. Skaggs Companies, 707 F.2d 1129 (10th Cir. 1983), cert. denied, 464 U.S. 938 (1983). The dissenting opinion below correctly observed that petitioner did not cause prejudice by failure to request reinstatement in his complaint and should have been permitted to seek reinstatement under the law set forth in Albemarle. Appendix A at 48-49. (Cook, J., dissenting).

Inherent in the decision of the trial court was a finding that plaintiff would have continued to work for the respondent BUT FOR the latter's intentional retaliatory racial discrimination. To reach this conclusion, the court rejected any inference that the employee's conduct was the basis for the discrimination. It is illogical to conclude that such conduct should be used to the victim's detriment in fashioning a remedy. Denial of

reinstatement in itself may result in a clear abuse of discretion. When coupled with a nominal award of front pay, the cumulative result is to deny the victim all prospective relief and complete justice. When the trial court chose to punish the victim, instead of the perpetrator of the discriminatory conduct, the court ignored the clear statutory and judicially-confirmed mandate to make the discrimination victim whole. See Albemarle, 411 U.S. at 296. This is an abuse of discretion because it completely disregards the policy of Title VII.

Respectfully submitted,

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APPENDIX A

Entry of the
United States Court of Appeals

Decided and Filed November 25, 1988

Case Nos. 87-3297/3298

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FEDERICO EREBIA,

Plaintiff-Appellant,
Cross-Appellee,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant-Appellee,
Cross-Appellant.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: **WELLFORD** and **NORRIS**, Circuit Judges; and **COOK***, District Judge.

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* THE HONORABLE JULIAN A. COOK, JR., United States District Court for the Eastern District of Michigan, sitting by

PER CURIAM. This is the second time this dispute has come before this court for resolution. Erebia, the plaintiff, was successful on a prior occasion in persuading a panel of the court to affirm a jury verdict totalling $40,000 in a hostile work environment claim against Chrysler Plastic Products Corporation ("CPPC") under 42 U.S.C. § 1981. See 772 F.2d 1250 (6th Cir. 1985). In 1984, following the resolution of that action, Erebia was discharged as an inspection supervisor. This subsequent employment action is the basis for the present action based upon a claim of retaliation brought under both § 1981 and Title VII.

In July 1984, CPPC's labor relations department received separate complaints about Erebia from three females, Betty

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designation.

Simmons, Susan Kerr, and Brenda Parker. Each complained that Erebia "had made unwanted sexual advances toward them, had requested sexual favors from them, and harassed them repeatedly to borrow money from them." The district court concluded that Erebia was guilty of the conduct complained of, and had created an intimidating and hostile work environment for these women subordinate to him.

Erebia, in fact, had been guilty of a similar kind of misconduct in the past. He was disciplined for bothering a female employee prior to these incidents, and also had an affair with a coworker which interfered with his work to such an extent that he had to be warned by his CPPC superiors to stop. These problems occurred years prior to the harassment complaints, however, and Erebia had been rated a good employee in an evaluation given just prior

to the charges bringing about his termination.

CPPC's handling of the complaints of the female employees raised questions about its true motives in terminating Erebia. It informed Erebia that the women had complained, but refused to give him copies of their statements. It told him that he had to respond in writing to the charges but did not tell him precisely when to respond, or exactly what the complaints were. CPPC terminated Erebia shortly after the complaints became formal requests for employer action, and it cited his previous record, the additional sexual harassment charges, and his failure to respond to them as bases for its action.

The district court recognized that Erebia's harassment of his female subordinates was certainly sufficient justification to fire him. But it also

found the decision to fire Erebia was made so soon after the formal charges were filed that even if Erebia had known when and what charges he had to answer, there would have been inadequate time for CPPC to consider Erebia's explanation. The court apparently felt some less drastic action might have been taken but for CPPC's desire to retaliate, or that Erebia ordinarily would have at least been given a fairer notice and a more reasonable chance to respond before termination. The district court found in plaintiff's favor despite the fact it was convinced Erebia had himself been guilty of misconduct.

The jury apparently agreed with the district court's rationale in deciding the § 1981 claim, because it decided retaliatory discharge had occurred and awarded Erebia $75,000 in compensatory damages and $55,000 in punitive damages.

The court itself did not award backpay, feeling that remedy had already been adequately provided by the jury's compensatory award. It also refused to reinstate Erebia, for three reasons. First, it noted that Erebia had only asked for front pay in his complaint, and had waited until just prior to closing arguments to demand reinstatement. CPPC accordingly did not argue against reinstatement in its defense, as it would have in the ordinary case, and thus had been prejudiced by the delay. A second reason given for the decision denying reinstatement was that the court believed Erebia could no longer work effectively at CPPC because of the hostility engendered during the course of the litigation. This second basis was closely related to the court's third justification that Erebia had shown he would not be able to be an

effective worker because he had repeatedly harassed female subordinates. The court's remedy was to award Erebia one dollar in front pay, attorney fees, and costs. The court then refused to grant CPPC's motion to set aside the jury verdict or to reconsider its award, and this appeal by both parties followed.

I. EREBIA'S APPEAL

The issue raised by Erebia's appeal is whether a court has discretion to find evidence of intentional discrimination, yet award neither reinstatement nor front pay. As stated, the court denied reinstatement, and awarded nominal front pay of only one dollar.

Reinstatement is a presumed remedy following from a finding of intentional discrimination, as part of Title VII's "make whole" remedy. It should not be

denied except for reasons unique to an individual case which will not undermine the remedial purposes of the statute. Franks v. Bowman Transportation Co., 424 U.S. 747, 779 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975). Erebia argues that the purposes of the statute were frustrated in this case by denial of reinstatement and front end pay. CPPC argues that the district court's remedy was predicated on the peculiar situation presented in this case.

We have approved a district court's refusal to reinstate in a case of this sort when the chances for a satisfactory employment relationship are dim. Shore v. Federal Express Corp., 777 F. 2d 1155, 1159 (6th Cir. 1985). Such a state of affairs seems present in this case because of Erebia's conduct toward his subordinates. The district court made a factual finding

that three women had been pressed for sexual favors and money by their supervisor. This is, of course, a serious problem for a satisfactory working environment, and one which might expose CPPC to further discrimination liability were Erebia to be retained. The relevant consideration under the circumstances is whether the district court properly decided Erebia would not be an effective employee at CPPC, and whether his reinstatement might generate further liability of CPPC to other employees. Based on the record before us, we cannot say the court abused its wide discretion in fashioning a particular remedy in this case. Henry v. Lennox Industries, Inc., 768 F.2d 746, 753 (6th Cir. 1985).[1] We find this additional

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[1] An additional basis for this result asserted that Erebia waived his right to request reinstatement. The court found that CPPC did not present any evidence to

circumstance of sexual harassment by Erebia to distinguish this case from In re Lewis, 845 F.2d 624, 630 (6th Cir. 1988).

The normal practice is to award front pay in those situations where reinstatement is not appropriate. Shore, 777 F.2d at 1159; Henry, 768 F.2d at 753. We have said an award of front pay is not, however, mandatory: "an award of front pay is sometimes appropriate in order to effectuate fully the 'make whole' purposes

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overcome the presumption of reinstatement because Erebia asked only for front pay until the very end of trial. Denial of remedies due to procedural problems brought about by a claimant does not violate the purposes of Title VII, as recognized in Albemarle: "To deny backpay because a particular cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII." 422 U.S. at 424 (emphasis in original). We find that rationale applicable to a reinstatement and front pay award as well, but we do not base our decision on this principle.

of Title VII." Shore, 777 F.2d at 1159 (emphasis added). The ADEA case relied on in Shore makes it even clearer that front pay is not demanded in every case. "'Front pay' does not appear to lend itself to a per se rule. It is neither mandated nor prohibited by the Act. Rather, it is but one of a broad range of remedial measures available under the ADEA." Davis v. Combustion Engineering, Inc., 742 F.2d 916, 922-23 (6th Cir. 1984).

We are also reluctant to conclude that the district judge acted improperly in this case because Title VII remedies are by their very nature equitable. A party requesting relief is thus subject to equitable doctrines limiting relief. For example, in St. John v. Employment Development Corp., 642 F.2d 273 (9th Cir. 1981), the plaintiff brought a retaliation claim when she was discharged following her

discrimination action. The district court found retaliation but refused reinstatement because, unknown to her employer at the time, she had leaked confidential information to the EEOC. The Ninth Circuit affirmed this action by the district court because principles of equity such as the doctrine of "clean hands", should appropriately be considered in deciding what remedies fit the situation, while recognizing the general "make whole" principle. Where a plaintiff had engaged in misconduct, the district court was within its discretion to limit her remedy to reflect her wrongdoing. Id. at 275. We accordingly affirm the district court's action here as to front end pay because the remedy reflects both the misconduct of employer and employee in this case. On the question of reinstatement, however, we remand the case for consideration as to

whether there is another equivalent position for Erebia available at CPPC for prompt reinstatement which would not involve the same potentiality of sexual harassment.

II. CPPC'S APPEAL

CPPC claims the court misapplied the standard of proof in finding liability at all under Title VII. Specifically, CPPC points to the fact that the judge referred to this case as a "mixed motive" question, citing Blalock v. Metal Trades, Inc., 775 F.2d 703 (6th Cir. 1985), a case in which direct evidence of discrimination was produced. CPPC claims that the case at issue did not present mixed motives, and that the district court improperly directed it to prove the alleged discriminatory motive was not the one resulting in the dismissal.

While the issue is a close one, we cannot conclude that the district court misapplied the burden of proof under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The district court found that Erebia had made out a prima facie case of discrimination; that CPPC had articulated a justifiable reason for dismissal, but that Erebia had proven this reason to be pretext. The trial judge stated "Chrysler failed to establish Erebia would have been discharged even in the absence of the impermissible motivation." Taken in the context of all of the court's other statements, this comment does little more than relate the court's feeling that CPPC's professed motivations were not persuasive. It did not reflect an erroneous placing of the burden of proof on defendant CPPC.

The evidence here is not overwhelming that CPPC retaliated against Erebia, but an

even bigger question is whether he proved the requisite motivation to justify punitive damages. The elements of retaliatory discharge are set out in Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 375 (6th Cir. 1984): a plaintiff must show that he previously asserted violations of Title VII rights; that he was discharged, and that a causal connection exists between the two events. Punitive damages are appropriate only where the defendant acted with intent to deprive the defendant of these rights, or with callous indifference towards them. In determining sufficiency of the evidence in such a case, the verdict must be upheld if "substantial evidence" supports it. Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986); Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986).

Substantial evidence is that amount of proof a reasonable man would accept to support a proposition. Richardson v. Perales, 402 U.S. 389 (1971).

The evidence related above suggests that the jury was faced with two alternatives. It could agree with CPPC that it fired Erebia because of his past work record and his harassment of fellow employees, or it could agree that Erebia was really fired because CPPC was upset that he won a discrimination suit against it less than a year earlier. Acceptance of Erebia's version of what happened does not make out an automatic punitive damages case. If the jury accepted Erebia's version of what happened, we agree it was proper to award

damages to compensate him for all injuries resulting from the action.[2]

Plaintiff argues that the fact that CPPC intentionally retaliated against him and that there had been a prior award in his favor affirmed against CPPC for punitive damages was a sufficient basis for the punitive damages for retaliation in this case. We doubt that these factors alone form an adequate basis for a punitive

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[2] Clearly, the jury's award reflects compensation for past and future harm to Erebia. Plaintiff's attorney during closing argument to the jury asserted:

> It is your duty to award that fair compensation based on the total past, present, and future of every injury . . . ." (Emphasis added)

J/A 567. Erebia was asking the jury to take into account future aspects of Erebia's injury for retaliatory discharge. The district court likewise stated in his instructions on damages to the jury:

> You may consider the damages that have occurred from the time of the discharge, on August 20, 1984 on.

award, and we would be reluctant to uphold a punitive award were there no more than this evidence in the case.

Judge Walinski instructed the jury, however, that it could award punitive damages only if the action of the defendant was "maliciously, wantonly, or oppressively done." J/A 573. This was a proper punitive damages instruction, and it correctly directed the jury to examine the critical question of CPPC's state of mind. Although we find it to be a close question, we are not prepared to find that the district court erred in not setting aside the punitive damages award. He was able to view the witnesses and to evaluate their credibility. He submitted a correct punitive damage charge to the jury and felt that it should not be set aside despite fault on the part of Erebia in his dealing with female subordinates. The decision of

the trier of fact as to deliberate intent and as to credibility in cases based upon allegations of discrimination are not to be set aside unless clearly erroneous, or unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. United States Gypsum, 333 U.S. 364, 395 (1948)). See also Few v. Yellow Freight, No. 86-5484 (6th Cir. April 25, 1988). We decline to set aside the punitive damage award.

In conclusion, we note that we have taken into account the totality of the award made to Erebia in this case, as did the district court. We recognize that equitable considerations were involved in the Title VII aspect of this case, including an award of substantial

attorney's fees and costs to Erebia in addition to his considerable jury award of damages for his discharge. The district court was aware the Erebia had been subsequently employed at another plastic manufacturer at substantial pay after his termination by CPPC in respect to his claim for added front end pay. In light of all this, we approve of the district court's treatment of this difficult case.

In sum, we **AFFIRM** the action of the district court in respect to both the § 1981 and the Title VII claims in this case, except that as to the possible remedy of reinstatement, we **REMAND** the case for further consideration of the ramifications of reinstatement only.

COOK, District Judge, Concurring, in part, and Dissenting, in part. I write to express my respectful disagreement with the majority opinion regarding the relief that

Federico Erebia should receive in connection with his Title VII claim. However, with regard to the remaining issues, I join with my colleagues.

The majority in this case have affirmed a decision by the trial court which essentially held that Erebia was not entitled to reinstatement or back pay even though he had been impermissibly subjected to retaliation by Chrysler Plastic Products Corporation (CPPC) in violation of Title VII. I do not believe that the record in this cause permits such a complete denial of equitable relief to a prevailing party.

My colleagues correctly point out that the denial of reinstatement and an award of only nominal front pay by the trial court are subject to review under an abuse of discretion standard. Henry v. Lennox Industries, Inc., 768 F.2d 746, 753 (6th

Cir. 1985) (reinstatement); Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985) (front pay not subject to a per se rule). However, I submit that the prevailing decision in this cause inaccurately describes the legal standard upon which reinstatement may be declined.

The Per Curiam holds that:

> The district court made a factual finding that three women had been pressed for sexual favors and money by their supervisor. This is, of course, a serious problem for a satisfactory working environment, and one which might expose CPPC to further discrimination liability were Erebia to be retained. The relevant consideration under the circumstances is whether the district court properly decided Erebia would not be an effective employee at CPPC.

Opinion at 5.

Yet, this description of the "relevant consideration" is at odds with our earlier ruling in In re Lewis, 845 F.2d 624, 630 (6th Cir. 1988). In that case, Judge Damon

J. Keith, writing on behalf of the majority, said:

> Federal courts have greatly limited the grounds on which reinstatement may be denied. It is not sufficient that reinstatement might have "disturbing consequences," Sterzing v. Fort Bend Independent School District, 496 F.2d 92, 93 (5th Cir. 1974), that is might revive old antagonisms or that it could "breed difficult working conditions," Allen, 685 F.2d at 1305. "Relief is not restricted to that which will be pleasing and free of irritation." Allen, 685 F.2d at 1305 (quoting Sterzing, 496 F.2d at 93).

Thus, it is my belief that the majority should not have relied upon the trial court's determination that Erebia "would not be effective at CPPC." The existence of difficult working conditions, antagonism, or disturbing consequences does not constitute sufficient exceptional circumstances, according to Lewis.

The majority also suggests that Erebia waived any opportunity for reinstatement by failing to request it in his Complaint even

though the statute and case law does not obligate him to do so. Erebia correctly notes that the Court of Appeals for the Tenth Circuit in Whatley v. Skags Companies, 707 F.2d 1129, 1137 (10th Cir.), cert. denied, 464 U.S. 938 (1983), determined that "such equitable relief may be provided, even if it was not sought in the pleadings." See also Sias v. Demonstrating Agency, 588 F.2d 692 (9th Cir. 1978); Fed. R. Civ. P. 54(c) (" . . . every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading").

CPPC relies upon Robinson v. Lorillard Corp., 444 F.2d 791, 803 (4th Cir. 19781), cert. dismissed, 404 U.S. 1006 (1972), in which the Court held that a failure to plead could bar reinstatement of a claimant

if it "substantially prejudiced" the other side. CPPC claims to have been substantially prejudiced because it lost an opportunity to prove that reinstatement was not feasible. The trial court agreed.

In a post trial proceeding, Erebia filed a Motion to Reinstate, to which CPPC responded:

> Unless an additional hearing for an evidentiary presentation on Title VII relief is convened [CPPC] will be prejudiced if [Erebia] is allowed to, in effect, amend his complaint at this late hour.

Tr. 70.

The only prejudice, if any, to CPPC was caused by the refusal of the trial court to hold an evidentiary hearing - not by any pleading deficiencies within the Complaint. In my judgment, this refusal constituted an abuse of discretion by the trial court. The majority's reliance upon Albemarle Paper Co. v. Moody, 424 U.S. 405 (1975) in

footnote 1 is inapposite to the instant cause, in that Erebia did not create or cause the prejudice in this case.[1] Thus, I believe that the decision of the trial court regarding reinstatement should be vacated and remanded for a hearing to determine whether placement of Erebia at another location within the company facility is an available option.

I also have difficulty with the handling of the front pay issue by the trial court. The majority acknowledges that "[t]he normal practice is to award front pay in those situations where reinstatement is not appropriate." Opinion at 5. However, the trial court never explained its reasons for rejecting the front pay issue. In a

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[1] The Court in Albemarle also held that, "The respondents here were not merely tardy, but also inconsistent, in demanding backpay." 422 U.S. at 424. Here, Erebia was, at most, tardy in his application to the Court for reinstatement.

conclusory fashion, the trial judge said that "Erebia is therefore awarded nominal compensatory damages including front pay, in the amount of one dollar ($1.00)." Tr. 22. Without some meaningful explanation, I do not believe that we can properly evaluate this conclusion by the trial court.

Accordingly, I must dissent on these points.

APPENDIX B

Entry of the
United States District Court
For the Northern District of Ohio
Western Division

Filed December 29, 1986

Case No. 84-7896

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FEDERICO EREBIA,

Plaintiff,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant,

JUDGMENT IN A CIVIL CASE

Verdict for plaintiff on 42 U.S.C. 1981 claim. Plaintiff awarded $55,000.00 punitive damages and $75,000.00 compensatory damages.

/s/ NICHOLAS J. WALINSKI, Judge

APPENDIX C

Entry of the
United States District Court
For the Northern District of Ohio
Western Division

Filed December 29, 1986

Case No. 84-7896

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FEDERICO EREBIA,

Plaintiff,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant,

JUDGMENT IN A CIVIL CASE

Motion for reinstatement and back wages denied; motion to strike denied as moot; plaintiff awarded $21,018.75 attorney fees; $345.70 costs. Plaintiff awarded $1.00

compensatory damages on Title VII. Case dismissed.

/s/ NICHOLAS J. WALINSKI, Judge

APPENDIX D

Entry of the
United States District Court
For the Northern District of Ohio
Western Division

Filed December 24, 1986

Case Nos. C 84-7896

FEDERICO EREBIA,

Plaintiff,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant,

FINDINGS OF FACT
CONCLUSIONS OF LAW
and
JUDGMENT

WALINSKI, J.

This matter is before the Court for a decision on the merits following trial to the Court of plaintiff's claim of retaliatory discharge under Title VII of the Civil Rights Act of 1964 ("Title VII"),

42 U.S.C. §2000e et seq. Plaintiff's claim under 42 U.S.C. § 1981 was tried to a jury. Said jury returned a verdict in favor of plaintiff in the amount of $55,000.00 punitive damages and $75,000.00 compensatory damages.

Also before the Court is plaintiff's motion for reinstatement, back wages and, if appropriate, to amend the judgment accordingly. The defendant has filed opposition. Further the Court will herein address plaintiff's request for attorney's fees and defendant's motion to strike.

The following discussion will comprise this Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

FACTS

Federico Erebia, a Mexican-American, was formerly employed by the defendant, Chrysler Plastic Products Corporation

("Chrysler"), at its Sandusky, Ohio manufacturing plant. Erebia had been employed by Chrysler (or its predecessor Air Reduction Corporation) since 1965. In 1969, Erebia was promoted from an hourly position to that of production foreman. With the exception of layoffs for lack of work, Erebia continued to be employed in various supervisory capacities until his discharge.

Prior to the instant lawsuit, Erebia had sued Chrysler in Case No. C 83-96. That case was tried on January 10 and 11, 1984. The only claim submitted to the jury was Erebia's claim pursuant to 42 U.S.C. § 1981 that two of his subordinates had used racial slurs toward him and that Chrysler had done nothing in response to his complaints. The jury awarded Erebia $10,000.00 in compensatory damages and $30,000.00 in punitive damages. On

appeal, the Sixth Circuit Court of Appeals affirmed the award of punitive damages but reversed the compensatory damages award. The appellate court remanded the case to this Court for an award of nominal compensatory damages.

The record indicates that beginning on July 24, 1984, Chester Ferguson, Chrysler's labor relations manager, received complaints from Betty Simmon, Susan Kerr, and Brenda Parker. These women worked directly under Erebia's supervision in the Inspection Department. The substance of the complaints indicated that Erebia had made unwanted sexual advances toward them, had requested sexual favors from them, and harassed them repeatedly to borrow money from them. The women's complaints were not solicited or encouraged by Ferguson or any other member of Chrysler's management.

Erebia's conduct toward the three female employees created an intimidating, hostile and offensive work environment.

Thereafter, Chrysler verbally reviewed the complaints with Erebia, but it refused to make copies available to him. Subsequently, Erebia submitted handwritten memoranda to Chrysler in response to the women's initial complaints. By August 3, 1984, the complaints had become formal charges against Erebia which sought action by Chrysler. Again, Chrysler verbally reviewed the complaints with Erebia and asked him for written responses to the allegations.

Prior to 1984, Erebia had been disciplined by Chrysler on several occasions. He had been given three separate disciplinary layoffs for absenteeism, improper conduct toward a female hourly employee, and sleeping during

working hours. Erebia also had been warned that his sexual affair with another female hourly employee had interfered with his work and such conduct could result in his discharge. The foregoing events, however, occurred several years prior to Erebia's discharge.

The only evaluation of Erebia's performance subsequent to the 1984 trial and prior to his termination, indicated Erebia's performance was satisfactory.

On August 20, 1984, Chrysler discharged Erebia from its employment. The reasons specified by Chrysler for said discharge were the sexual and racial harassment of Simmon, the sexual harassment of Kerr and Parker, Erebia's prior disciplinary record and his refusal to respond further to the complaints.

With regard to the complaints, Erebia was neither provided with copies of the

complaints nor advised as to when a written response was definitely required. Moreover the recommendation to terminate Erebia was made shortly after the August 3, 1984 meeting, seventeen days prior to Erebia's formal discharge. It is highly questionable, therefore, that any written response provided by Erebia were to be given proper consideration.

Upon the facts before it, the court finds that Erebia was terminated in retaliation for his prior charges and successful litigation against Chrysler.

TITLE VII CLAIM

Erebia's title VII claim is one for retaliatory discharge. Thus, Erebia has the initial burden of establishing a prima facie case of discrimination. Erebia must prove that (1) he previously asserted and complained about violations of rights protected by Title VII; (2) Chrysler took

adverse employment action against him; and (3) a causal connection existed between his assertion of protected rights and the adverse employment action. Jackman v. RKO Bottlers of Toledo, Inc., 743 F.2d 370, 375 (6th Cir. 1984). Having established a prima facie case, the burden of production shifts to Chrysler to articulate some legitimate, non-discriminatory reason or reasons for its decision to discharge Erebia. If Chrysler articulates such a reason, Erebia must then prove the stated reasons were not the true reasons for his discharge. Id. Hence, he must establish that Chrysler's retaliatory intent "more likely than not was the basis of the adverse employment action." Blalock v. Metals Trades, Inc., 775 F. 2d 703, 709 (6th Cir. 1985). In summary, in a mixed-motive context such as this,

> a plaintiff need demonstrate by a preponderance of the evidence that the employer decision to take adverse employment action was more likely than not motivated by a criterion proscribed by the statute. Upon such proof, the employer has the burden to prove that the adverse employment action would have been taken even in the absence of the impermissible motivation, and that therefore, the . . . discriminatory animus was not the cause of the adverse employment action.

Id. at 712.

Based on the record, the Court finds that Erebia established a prima facie case of retaliatory discharge. Further, Chrysler rebutted the presumption of retaliation by articulating legitimate, non-discriminatory reasons for its decision to discharge Erebia. However, Erebia carried his ultimate burden by establishing the pretextual nature of Chrysler's articulated reasons. Thus, while Erebia did sexually harass the three female employees, the recommendation and

subsequent discharge of Erebia was motivated by Chrysler's retaliatory intent, i.e. Chrysler retaliated against Erebia for his earlier assertion of rights under Title VII. Chrysler failed to establish Erebia would have been discharged even in the absence of the impermissible motivation.

Based on the record before it, therefore, the Court finds Chrysler violated Title VII through its retaliatory discharge of Erebia.

The Court now addresses the relief to which Erebia is entitled in this case. "Where a person claiming employment discrimination is successful under both Title VII and 42 U.S.C. § 1981, he is entitled to only one recovery of damages." Muldrew v. Anheuser-Busch, Inc., 554 F.Supp. 808, 810 (E.D. Mo. 1982), aff'd, 728 F. 2d 989 (8th Cir. 1984). Thus, "damages are only recoverable once for a

transaction involving two violations of law." Williams v. Transworld Airlines, Inc., 660 F. 2d 1267, 1274 (8th Cir. 1981) (citations omitted).

In the case sub judice, the issue of back wages was submitted to the Jury. Upon a review of the evidence the jury awarded Erebia $75,000.00 in compensatory damages. The Court finds that the jury's award included back wages and compensatory damages for emotional and mental pain and suffering. Thus, Erebia has been fully compensated for back wages.[2]

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[2]Relying on Keet v. Service Machine Co., 472 F.2d 138 (6th Cir. 1972), Erebia argues Ohio's two issue rule applies where, as here, the jury could have decided the total compensatory damages of $75,000.000 to be allocated to emotional and mental pain and suffering. Keet is inapplicable. As the instant case was tried pursuant to federal civil rights law, state law does not supply the rule of decision. Moreover, the two issue rule applies only when two substantive issues have been submitted to the jury and returned under a general verdict, and the jury has been incorrect on

MOTION FOR REINSTATEMENT

Because Erebia has specifically moved for reinstatement and back wages, the Court deems it proper to specifically address Erebia's motion. As stated above, the jury's award for compensatory damages includes back wages. In light of this determination and because the Court finds Erebia has been adequately compensated, additional back wages are not an appropriate remedy. The Court, therefore, will deny Erebia's request for back wages.

With regard to Erebia's request for reinstatement, his complaint did not specifically request this remedy. Erebia's complaint did seek lost wages in the amount of $10,000.00 and loss of future wages in the amount of $600,000.00. Erebia requested reinstatement at a conference in

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one of the two issues. Keet has no application to apportionment of damages.

chambers just prior to closing arguments and the charge to the jury.

One of the purpos[es] of Title VII is to make a person "whole" for injuries caused by illegal employment discrimination. Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975). Thus, successful Title VII claimants presumptively are entitled to reinstatement. Nord v. United States Steel Corp., 758 F.2d 1462, 1473 (11th Cir. 1985). Reinstatement, however is not mandatory. The Sixth Circuit has indicated reinstatement may be inappropriate where it would displace the person who presently has the position, and when the hostility which unfortunately exists between the parties precludes the possibility of a satisfactory employment relationship. Shore v. Federal Express, 777 F.2d 1155, 1159-60 (6th Cir. 1985). See also Whittlesey v. Union Carbide, 742 F.2d 724 (2nd Cir. 1984);

Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984).

Based on the record, the Court finds Erebia has waived the right to demand reinstatement. Erebia never made Chrysler aware he sought this remedy until near the end of the trial. While it is true that Erebia was presumptively entitled to reinstatement, Erebia waived his right to demand reinstatement when he requested front pay. Inasmuch as front pay is an equitable remedy in lieu of reinstatement, Shore, 777 F.2d at 1159-60, Chrysler was led to believe that reinstatement was not an issue before the Court. Further, to permit Erebia to seek reinstatement at this stage of the litigation would prejudice Chrysler who, by Erebia's own arguments, bears the burden of proving that Erebia is not entitled to reinstatement. Chrysler, therefore, was deprived of the opportunity

to demonstrate the inappropriateness of Erebia's reinstatement including evidence that the position is filled by another employee.

Even assuming arguendo Erebia could request reinstatement at this late date, the Court finds that reinstatement is inappropriate because of the hostile relationship between the parties. During the course of trial the hostility between Chrysler and Erebia was evident. Thus, he contended Chrysler's activities were willful, malicious and intentional. Erebia now states that "[t]here really was no significant animosity exhibited between the parties." (Brief in Support of Motion at 2). The Court disagrees. Sufficient evidence exists to find a high degree of hostility between the parties. More importantly, the women harassed by Erebia were under his direct supervision.

Erebia's reinstatement would make the women's employment relationship intolerable. These employees should not be subjected to such employment conditions. In light of the foregoing discussion, the Court finds Erebia could not function effectively as a member of Chrysler's management team.

In summary, the Court finds Erebia was retaliatorily discharged for having filed his previous lawsuit. Thus, he was not permitted to view or acquire written copies of the complaints filed by the female employees. Further, Ferguson never advised Erebia that if he did not submit a written response by August 20, 1984 he would be terminated. Moreover, even if Erebia had submitted written responses to the complaints, the consideration of said responses is highly questionable as Ferguson already had recommended Erebia's

termination. The Court further finds that Erebia did sexually harass the three female employees directly under his supervision. Erebia is therefore awarded nominal compensatory damages including front pay, in the amount of one dollar ($1.00).

ATTORNEY FEES

As the prevailing party, Erebia seeks to recover attorney fees. The standard for the award of attorney fees is now well settled. In Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) the court set forth principles which must be considered in ruling on a claim for attorney fees. "[A] fee calculated in terms of hours is the fairest and most manageable approach . . . "to award attorney fees. Id. at 636. However, the Court need not automatically accept the hours claimed by a party. Id. Once the

Court determines the number of hours reasonably expended on the litigation the hours are multiplied by a reasonable hourly rate.

Erebia's counsel claims a total of 259.25 hours for services in this case. The Court will disallow the following as excessive:

1. Counsel claims 5.5 hours for October 30, 1984 during which he researched the case and dictated the complaint. Counsel is an experienced attorney familiar with this area of the law. He had been successful in Erebia's previous litigation. Thus, the Court will disallow three hours.

2. Counsel claims twelve hours (March 11 & 15, 1986) spent discussing and preparing for depositions. As this amount is excessive, the Court will disallow four hours.

3. The Court will disallow six hours of the 24.5 hours claimed by counsel in preparing and conducting various depositions including that of Erebia.

4. Counsel claims three hours (March 31, 1986) reviewing the file and preparing interrogatories. The Court will disallow one hour as excessive.

5. The Court will disallow three hours of the six claimed in reviewing the depositions with Erebia.

6. Counsel claims eight hours (April 16-17, 1986) relating to the deposition of Erebia's wife and additional research. The Court will disallow three hours.

7. Counsel claims seven hours (April 19, 1986) for a case review and a meeting with Erebia to discuss plaintiff's deposition. The Court will disallow three hours.

8. Counsel claims fourteen hours (April 23, 1986) for review of witnesses' depositions. As counsel had on a previous occasion reviewed said depositions, the Court will disallow five hours.

9. Counsel claims 90.5 hours in preparation for and actual trial time. The Court will disallow ten hours.

Upon consideration of the foregoing, the Court will permit 221.25 hours at a rate of ninety-five dollars ($95.00) per hour for a total of $21,018.75 in attorney fees.

COSTS

Next, Erebia seeks to have various expenses totalling $2,895.15 taxed as costs in this proceeding. The Court will disallow $1,249.25 for the cost of depositions of those witnesses who testified at trial. There is no indication these witnesses would be unavailable to testify at trial, the depositions therefore

were not utilized to preserve testimony. Rather, the depositions were used for discovery. The Court also will disallow $201.60 for an unspecified transcript from Rose M. Cannon. Erebia claims $1,145.00 in fees and expenses for two expert witnesses. Of this amount, the Court will allow thirty-five dollars per witness. Erebia has failed to specify mileage for these two individuals. Finally, the Court will disallow twenty-three dollars 60/100 ($23.60) claimed for Brigitte Churchwell. Erebia has failed to identify this individual and her relationship to this case. In summary, the Court will allow $345.70 as costs.

Wherefore, plaintiff is awarded nominal compensatory damages in the amount of One Dollar ($1.00) as front pay in lieu of reinstatement, for his retaliatory discharge by defendant.

Furthermore, plaintiff is awarded attorney fees in the amount of $21,018.75 and costs in the amount of $345.70.

Furthermore, plaintiff's motion for reinstatement is denied, and defendant's motion to strike is denied as moot.

Furthermore, it is ordered that the clerk enter judgment accordingly.

IT IS SO ORDERED.

/s/ Nicholas J. Walinski
Senior U.S. District Judge

Toledo, Ohio
December 23, 1986

APPENDIX E

Entry of the
United States District Court
For the Northern District of Ohio
Western Division

Filed February 26, 1987

Case No. 84-7896

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FEDERICO EREBIA,

Plaintiff,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION,

Defendant,

OPINION AND ORDER

WALINSKI, J.

This matter is before the Court on defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Also before

the Court is plaintiff's opposition thereto.

The case was tried on April 29, 1986, through May 5, 1986. Plaintiff's claim under 42 U.S.C. §1981 was tried to a jury and plaintiff's claim under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e et seq., was tried to the Court. With regard to the §1981 claim, the jury returned a verdict in favor of plaintiff in the amount of $55,000.00 punitive damages and $75,000.00 compensatory damages. Thereafter, on December 24, 1986, the Court rendered a verdict for plaintiff on the Title VII claim. Defendant's motion is directed at the verdict on the §1981 claim.

Defendant argues that a judgment notwithstanding the verdict ("JNOV") should be granted on plaintiff's §1981 claim because there is insufficient evidence as a

matter of law of a causal connection between plaintiff's discharge and either his race or the first litigation between the parties.

Rule 50(b), Fed. R. Civ. P., addresses motions for JNOV. In pertinent part, the rule states:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

The Sixth Circuit Court of Appeals has set forth the standard for granting a motion for JNOV.

> Judgment notwithstanding the verdict is not proper unless the evidence is

> such that there can be but one reasonable conclusion as to the proper verdict. It should not be granted if there is a conflict in the evidence, and the credibility of the evidence is not to be considered in passing on [the] motion for judgment.

Merkel v. Scovill, Inc., 787 F.2d 174, 177 (6th Cir. 1986) (quoting Hill v. Spiegel, Inc., 708 F.2d 233, 237 (6th Cir. 1983)); Ridenour v. Lawson Co., 791 F. 2d 52, 55 (6th Cir. 1986); Hill v. Spiegel, Inc., 708 F.2d at 237.

The Court is not permitted to substitute its opinion for that of the jury. Wilkins v. Eaton Corp., 790 F.2d 515, 522 (6th Cir. 1986) (quoting Brady v. Southern Railway Co., 320 U.S. 476, 479-80 (1943)). Accordingly, it must view "the evidence, and reasonable inferences therefrom . . . in the light most favorable to the nonmoving party and the Court must not consider the credibility of witnesses nor weigh the evidence." Id.

With the foregoing discussion as a guide, the Court now addresses defendant's motion for JNOV. The Court has reviewed the arguments made by the parties and finds that a judgment for the defendant notwithstanding the jury's verdict is not warranted in the case sub judice. Pursuant to this Court's findings on the Title VII claim, defendant was found to have discharged plaintiff because of the prior litigation. The Court is persuaded that defendant's actions with reference to the §1981 claim also were of a retaliatory nature. Defendant's motion for JNOV, therefore, must be denied.

Defendant next argues that the Court should grant its motion for a new trial. In support of its motion, defendant contends that a new trial is necessary because the issue of race was effectively and improperly removed from the case by the

Court's comment during the charge that there was no dispute that plaintiff is Mexican-American. Defendant argues that "[t]his observation was prejudicial to defendant because the issue of race is a crucial factual as well as legal element in this case." (Defendant's Motion at 26) (emphasis in original). Defendant correctly notes that §1981 does not prohibit national origin discrimination per se; rather, §1981 prohibits racial discrimination. Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250, 1253-54 (6th Cir. 1986). Thus, defendant contends that the issue of whether plaintiff is perceived as a racial minority within the scope of §1981 should have been decided by the jury.

Ordinarily, the Court might agree with defendant's position. However, a review of the litigation between these parties reveals that this issue previously had been

decided. A prior jury and the Sixth Circuit Court of Appeals have found that plaintiff comes within the protection of §1981. Id. at 1254. This issue, therefore was res judicata. Accordingly, the only issue properly before the jury in the instant case was whether plaintiff's "race" was the motivational basis for defendant's action. Upon this question the jury returned a verdict for plaintiff.

With regard to defendant's remaining arguments on its motion for a new trial, the Court is persuaded that a new trial is not warranted. Defendant correctly submits that plaintiff's claim for back wages was improperly submitted to the jury. However, pursuant to this Court's findings on plaintiff's Title VII claim, wherein compensatory damages in the amount of one dollar ($1.00) were awarded, defendant has suffered no demonstrable harm. This is

especially true since the Court found that plaintiff was retaliatorily discharged thus entitling him to back wages. Had the jury not considered the issue of back wages, this Court, as a result of defendant's Title VII violation, would have been compelled to award back wages in excess of the amount awarded plaintiff under his Title VII claim in this Court's previous order. Therefore, because defendant has suffered no economic loss, the Court concludes that a new trial is not warranted.

With reference to defendant's final arguments, the Court finds that the jury's verdict is not against the manifest weight of the evidence. Nor is the punitive damages verdict excessive or the product of sympathy, passion and prejudice.

In light of the foregoing discussion,

defendant's motion is not well taken. Therefore, it is

ORDERED that defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial is denied.

/s/ NICHOLAS J. WALINSKI, Judge

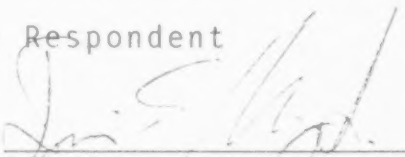
Toledo, Ohio
February 25, 1987

CERTIFICATION

This is to certify that three copies of the foregoing Petition for a Writ of Certiorari were served upon the respondent in the foregoing cause, by sending same by ordinary mail, with postage prepaid, on this 23rd day of February, 1989, addressed as follows:

Mary Ann Whipple, Esq.
Fuller & Henry
One SeaGate, 17th Floor
Post Office Box 2088
Toledo, Ohio 43603-2088

Counsel for Respondent



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